Petition

81-674

No._____

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IN THE

Supreme Court of the United States

October Term, 1981

JAMES D. GRIFFIN, Mayor of the City of Buffalo,

Petitioner,

vs.

GEORGE ARTHUR, *et al.*,

Respondents,

and

THE BOARD OF EDUCATION OF THE CITY OF BUFFALO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Did the May 19th Order of the District Court contain sufficient findings of fact (under F.R.C.P. 52(a)) to enable the Court of Appeals to adequately review the Order on appeal?

2. Should the Court of Appeals have remanded to the District Court for further findings of fact?

Parties

Petitioner:

JAMES D. GRIFFIN, Mayor of the City of Buffalo, found to be an essential party to this action by the United States District Court for the Western District of New York in its Order of June 8, 1981.

Respondents:

GEORGE ARTHUR, *et al.*, Plaintiffs in the original action and

THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, Defendants in the original action.

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IN THE

Supreme Court of the United States

October Term, 1981

No._____

JAMES D. GRIFFIN, Mayor of the
City of Buffalo,

Petitioner,

vs.

GEORGE ARTHUR, *et al.*,

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and

THE BOARD OF EDUCATION OF THE
CITY OF BUFFALO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, dated July 17, 1981, is not officially reported and is printed in the Appendix at p. 77.

The May 19, 1981 Order of the United States District Court for the Western District of New York, which was appealed to the Court of Appeals, is not officially reported and is reproduced at p. 17 of the Appendix.

The January 5, 1981 opinion of the Court of Appeals, remanding to the District Court an earlier appeal in this action, is reported at 636 F2d 905, and is reproduced in the Appendix at pages 10-16.

Statement of Jurisdiction

The judgment of the Court of Appeals sought to be reviewed is dated, and was entered July 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Statutes Involved

Title 28 U.S.C., Federal Rules of Civil Procedure

Rule 52. *Findings by the Court*

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Statement of the Case

The original suit in this case was brought as a class action in the United States District Court for the Western District of New York on June 26, 1972. Plaintiffs alleged that they and the class they represented had been deprived of their 14th Amendment equal protection rights by the defendants. Federal jurisdiction in the District Court was conferred by 42 U.S.C. Sec. 1983 and 28 U.S.C. Sec. 1343.

The Buffalo, New York public school system was found to have been intentionally segregated in *Arthur v. Nyquist*, 415 F.Supp. 904 (W.D.N.Y. 1976), aff'd in part, rev'd and remanded in part, 573 F2d 134 (2d Cir. 1978). This action is currently in the remedy phase.

The most recent remedial plan ("Phase III") implemented by the City of Buffalo Board of Education was tentatively approved by orders of the District Court dated June 19, 1980 and August 8, 1980. The plaintiffs appealed these orders to the United States Court of Appeals for the Second Circuit, and oral argument was heard on December 12, 1980. On January 5, 1981, the Court of Appeals remanded the case to the District Court for specific findings as to the adequacy of Phase III as a remedy for dismantling Buffalo's dual school system. *Arthur v. Nyquist*, 636 F2d 905 (2d Cir. 1981).

Following remand, and as a result of negotiations between the parties, the Board of Education filed an expedited version of Phase III with the District Court on January 27, 1981. This plan ("Phase IIIx") called for fixed assignments beginning in September, 1981. A hearing was held in the District Court on April 7, 1981 to present alternative proposals. On May 19, 1981, the District Court issued an order directing implementation of Phase IIIx for September, 1981 (Appendix, p. 17).

Petitioner James D. Griffin, Mayor of the City of Buffalo, filed a notice of motion dated June 2, 1981. The motion asked that the Mayor be made a party to the action with standing to appeal the May 19th Order and sought certification of the Order under 28 USC, Sec. 1292(b) (Appendix, p. 38). The motion was briefed (Appendix, pp. 49-59) per the June 2, 1981 Order of the District Court (Appendix, p. 48) and ruled upon in the Order of June 8, 1981 (Appendix, p. 60).

In the June 8, 1981 Order, the District Court found that the Mayor was an essential party to the law suit. The Court denied the request for certification, but ruled that the May 19th Order was in the nature of a preliminary injunction and, therefore, appealable as of right under 28 USC, Sec. 1292(a)(1).

Petitioner James D. Griffin thereupon filed a notice of appeal (Appendix, p. 63) with the United States Court of Appeals for the Second Circuit on June 9, 1981 from the District Court Order of May 19, 1981. In turn, Plaintiffs filed a notice of motion for dismissal of the appeal on June 22, 1981 (Appendix, p. 64). The motion was argued on July 14, 1981, and the Court of Appeals heard argument on the merits the same day. Petitioner-Appellant argued on the appeal that the District Court failed to make findings of fact and conclusions of law (under Federal Rules of Civil Procedure 52(a)) sufficient to support either the Phase III or IIIx desegregation plans. In its decision of July 17, 1981 (Appendix, p. 77), the Court of Appeals denied the Plaintiffs-Appellee's motion to dismiss the appeal and affirmed the Order of May 19th.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

Rule 52(a) of the Federal Rules of Civil Procedure requires that:

> "... in all actions tried upon the facts without a jury ... the court shall find the facts specially and state separately its conclusions of law ... and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action."

In the instant case, the District Court's Order of May 19, 1981 (Appendix, p. 17) was issued without sufficient findings of fact to satisfy either Rule 52(a) or the Court of Appeals' directive on remand. (*Arthur v. Nyquist*, 636 F2d 905 (1981)).

This Court has addressed the problem of the sufficiency of findings which will allow proper appellate review in *Hatahley v. United States*, 351 U.S. 1973, 76 S.Ct. 745, 100 L.Ed. 1065 (1956). This Court held that it is necessary that findings be made with "sufficient particularity so that they may be reviewed". *Hatahley*, 351 U.S. 173, 182. Where the findings are inadequate for review, the case must be remanded to the District Court for the appropriate findings. *Id.* at 182.

More specifically, this Court held, in *Mayo v. Lakeland Highlands Canning Co.*, 309 US 310 at 316, 60 S.Ct. 517, 84 L.Ed. 774 (1940), that:

> "It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be a fair compliance with Rule 52(a) of the Rules of Civil Procedure."

District Court Judge John T. Curtin characterized his Order of May 19, 1981 as being "in the nature of a preliminary injunction", in his Order of June 8, 1981 (Appendix, p. 62).

The United States Court of Appeals for the Second Circuit has consistently required findings of fact specific enough to allow adequate review on appeal. Where the findings are insufficient, the case must be remanded to the trial court. *E.g., Neuberger, Loeb & Co. v. Gross*, 563 F2d 1057 (2d Cir. 1977), cert. den., 434 US 1035, 98 S.Ct. 769, 54 L.Ed. 2d 782 (1978); *Lemelson v. Kellogg Co.*, 440 F2d 986 (2d Cir. 1971); *Fuchstadt v. United States*, 434 F2d 367 (2d Cir. 1970). In fact, within the course of the instant litigation, the Court of Appeals has remanded for "specific findings as to the adequacy of Phase III as a remedy for dismantling Buffalo's dual school system". *Arthur v. Nyquist*, 636 F2d 905 (2d Cir. 1981).

The remand order in *Arthur v. Nyquist, supra*, came on the plaintiffs' appeal from orders of the District Court approving the "Phase III" school desegregation plan. In its decision, the Court of Appeals points out the "paucity of detailed factual findings . . ." in those orders. *Id.* at 906. The decision repeatedly cites the lack of findings concerning the sufficiency or shortcomings of the school desegregation plan as reasons for the remand to District Court Chief Judge Curtin. *Id.* Despite these clear directions from the Court of Appeals, the May 19, 1981 Order of the District Court suffers from the same infirmities as the orders appealed from in *Arthur v. Nyquist, supra.*

The District Court decision and Order of May 19, 1981, does not contain specific findings of fact as to the sufficiency of Phase IIIx as a desegregation plan. Indeed, a large segment of the decision seeks to explain the

absence of such findings (Appendix, pp. 21, 34, 35). Chief Judge Curtin explains in footnote 2 to the Order that the parties consented to a delay in the filing of comprehensive findings of fact (Appendix, p. 34). It should be noted that the Petitioner Mayor was not a party to the lawsuit at the time of that agreement. (He was made a party by the June 8, 1981 Order of the Trial Court.) (Appendix, p. 61). However, even if Petitioner had been a party, it is difficult to understand how the parties could agree to derogate the Court of Appeals remand order that "more comprehensive findings must be made on this issue". *Arthur v. Nyquist*, at 907 (Appendix, p. 16).

In footnote 3 to the May 19th Order (Appendix, p. 34), Chief Judge Curtin further explains the lack of findings of fact as a result of the heavy caseload of the Western District Court. While this is an understandable explanation, surely it cannot excuse compliance with the remand order of the Court of Appeals and Federal Rule of Civil Procedure 52(a).

In *Arthur v. Nyquist* at 907, the Court of Appeals said:

> "(I)t is difficult to discern the evidence upon which he (Chief Judge Curtin) based approval of the Phase III plan. Therefore, the case is remanded for specific findings."

The May 19, 1981 Order, which was equally lacking in specific findings, was appealed to the Second Circuit by the present Petitioner. Despite the failure of that Order to satisfy the Court of Appeals remand order; Federal Rule of Civil Procedure 52(a); and prior Second Circuit standards (see *Neuberger, supra*); the Court of Appeals simply affirmed the May 19th Order. The

absence of the factual findings required by the above authorities denied the Petitioner effective review of the Order at the Court of Appeals. The Second Circuit should have remanded to the Trial Court for the factual development which was previously ordered in *Arthur v. Nyquist, supra.* Alternatively, the Court of Appeals might have found the record sufficient to undertake its own review of the Phase IIIx desegregation plan. These approaches would have yielded the Petitioner the effective review which he clearly was denied on the appeal to the Second Circuit.

Conclusion

This Court (in *Hatahley, supra* and *Mayo, supra*) and the United States Court of Appeals for the Second Circuit (in *Neuberger, etc., supra*), have consistently required a high degree of specificity in the factual findings required by Federal Rules of Civil Procedure 52(a). Earlier in this same litigation, the Second Circuit ordered the United States District Court for the Western District of New York to make specific findings as to the adequacy of the Buffalo school desegregation plan. *Arthur v. Nyquist,* 636 F2d 907 (1981). The May 19, 1981 Order of the Western District Court did not fulfill these requirements as to factual findings. The Court of Appeals should have remanded the case to the District Court for appropriate findings (see *Hatahley,* 351 US 173, 182), instead of affirming the incomplete Order (see Appendix, p. 79).

Petitioner prays that a Writ of Certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Dated: Buffalo, New York
September 30, 1981

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit, Dated January 5, 1981

GEORGE ARTHUR, et al.,
Plaintiffs-Appellants,

vs.

EWALD P. NYQUIST, et al.,
Defendants-Appellees,

and

COMMUNITY ADVISORY BOARD FOR BILINGUAL EDUCATION OF BUFFALO, etc., et al.,
Intervenors-Appellees.

Nos. 427-8, Dockets 80-7582, 80-7682.

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

Argued Dec. 12, 1980.

Decided Jan. 5, 1981.

Appeal was taken from orders of the United States District Court for the Western District of New York, John T. Curtin, Chief Judge, approving a plan submitted by school board for the desegregation of public school system. The Court of Appeals, Mulligan, Circuit Judge, held that paucity of detailed factual findings supported district court's approval of school board's plan and, on the record presented, Court of Appeals could not deter-

mine whether the school board had demonstrated that the plan represented the maximum desegregation practically achievable and, therefore, the case would be remanded for more comprehensive findings.

Remanded.

1. Schools—13(21)

Without initial resolution of timeliness of remedy for intentional school desegregation by the district court, it was premature for the Court of Appeals to determine whether the school board discharged its burden of coming forth with an accountable plan "that promises meaningful and immediate progress toward dis-establishing state-imposed segregation."

2. Schools—13(20, 21)

Paucity of detailed factual findings supported district court's approval of school board's plan for the desegregation of public school system and Court of Appeals could not determine on the record presented whether the board demonstrated that the plan represented the maximum desegregation practically achievable and therefore, the case was remanded to the district court for more comprehensive findings.

Richard F. Griffin, Buffalo, N. Y. (Thomas I. Atkins, Gen. Counsel, NAACP, New York, New York, David G. Jay, Buffalo, N.Y., of counsel), for plaintiffs-appellants.

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit, Dated January 5, 1981.

Aubrey V. McCutcheon, Jr., Detroit, Mich. (William E. Carey, Asst. Corp. Counsel, Joseph P. McNamara, Corp. Counsel, Buffalo, N.Y., of counsel), for defendants-appellees.

J. Edmund De Castro Jr., Buffalo, N.Y. (Community Advisory Board for Bilingual Education of Buffalo, et al., James A. W. McLeod, Buffalo, N.Y., Concerned Citizens for Education, of counsel), for intervenors-appellees.

Before LUMBARD, MULLIGAN and VAN GRAAFEILAND, Circuit Judges.

MULLIGAN, Circuit Judge:

This is an appeal from orders of the Western District of New York, Chief Judge John T. Curtin, approving a plan submitted by the appellee-Board of Education (Board) for the desegregation of Buffalo's public school system which was found to have been intentionally segregated in *Arthur v. Nyquist*, 415 F.Supp. 904 (W.D.N.Y.1976), aff'd in part, rev'd and remanded in part, 573 F.2d 134 (2d Cir.1978). The appellants assert that the Board's plan, known as "Phrase III," is an incomplete and ineffective remedy for past discrimination and unconstitutionally places an undue burden on minority students to accomplish school desegregation. The Board responds that its plan, which relies to a great extent on voluntary transfers and school closings, will achieve as much integration as is practicable in light of the various circumstances besetting the city and school district. The Board also categorically denies that its plan

places an unequal burden on minorities. Although too many years have elapsed since this litigation commenced, this court is unable on the record before us to review the district court's approval of Phase III and therefore the case is remanded for further factual development by the district court.

[1] It is apparent that even as this appeal was taken, the time schedule for implementing Phase III and the "final deadline" for achieving system-wide desegregation were not agreed upon by the parties and had not yet been submitted by the Board to the district court. The proposed schedule was eventually submitted to the district court a week before oral argument of this appeal and thus, we have had neither notice of the contents of the proposal nor the benefit of the district court's consideration of this issue. The timeliness of the remedy for intentional school segregation is certainly a major source of contention between the appellants and the Board and is of the utmost constitutional importance. *Green v. County School Board*, 391 U.S. 430, 439, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716 (1968). Without initial resolution of this matter by the district court, it is premature for this court to determine whether the school board has discharged its burden of coming forth with an acceptable plan "that promises meaningful and immediate progress towards dis-establishing state-imposed segregation." *Green v. County School Board, supra*, 391 U.S. at 439, 88 S.Ct. at 1694; *see Alexander v. Board of Education*, 396 U.S. 1218, 1222, 90 S.Ct. 14, 16, 24 L.Ed.2d 41 (1969).

[2] In addition, the district court orders appealed from provide a paucity of detailed factual findings to support approval of the Board's plan, leaving this court with a myriad of inconclusive maps and statistics offered by both parties in aid of their conflicting positions. The district courts have been vested with discretion to use "broad and flexible equitable powers to implement a remedy that [is both] sensitive to the burdens that can result from a decree and the practical limitations involved. . . ." *United States v. DeSoto Parish School Board*, 574 F.2d 804, 811 (5th Cir.), cert. denied, 439 U.S. 982, 99 S.Ct. 571, 58 L.Ed.2d 653 (1978). In recognition of this active role of the district court judge in devising and monitoring Buffalo's school desegregation plans we hesitate to scrutinize data before the district judge affords the appellate court with specific conclusions to review. For example, although Chief Judge Curtin stated that "the Board has taken substantial steps to provide an ever-increasing number of children with an opportunity for an integrated education," September Term 1980-81 school enrollment statistics filed with this court just prior to oral argument, show that many segregated schools still remain. We have no findings from the district court with regard to this data.

Furthermore, there are no findings in the most recent orders regarding the shortcomings of Buffalo's second school desegregation plan that we identified by Chief Judge Curtin when he disapproved that plan and ordered further development of a system-wide remedy. *Arthur v. Nyquist*, 473 F.Supp. 830 (W.D.N.Y.1979). The deficien-

cies of the earlier plan included, among others, retention of many one-race schools, structural and administrative inefficiency of the Quality Integrated Education (QIE) program, unduly complex transportation system, and the placement of a disproportionate burden of desegregation on innercity minorities. Whether these problems have been sufficiently ameliorated is not expressly addressed in the orders that form the basis of this appeal and the findings of fact and conclusions of law required by Fed.R.Civ.Proc. 52(a) are absent. Although Chief Judge Curtin admitted that hearings on many of these issues were not completed and that certain matters require additional attention by the Board,[1] it is difficult to discern the evidence upon which he based approval of the Phase III plan. Therefore, the case is remanded for specific findings as to the adequacy of Phase III as a remedy for dismantling Buffalo's dual school system, see *Swann v. Board of Education*, 402 U.S. 1, 31, 91 S.Ct. 1267, 1283, 28 L.Ed.2d 554 (1971), specification of additional remedies to be employed, and for careful and detailed analysis to determine whether Phase III impermissibly burdens minority parents and children with the responsibilities and inconveniences of achieving desegregation. *See Monroe v. Board of Commissioners*, 391 U.S. 450, 458, 88 S.Ct. 1700, 1704, 20 L.Ed.2d 733 (1968);

[1] The District Court reserved decision on the following issues: Hispanic-intervenors' plans for bi-lingual education; appointment of a "monitor" to oversee progress of desegregation; proposals for four all-minority schools which the Board concedes are "indeterminates" for future desegregation. In addition, no reference has been made to faculty assignments which had previously reflected "intentional segregation by the school board." *Arthur v. Nyquist*, 573 F.2d 134, 144 (2d Cir. 1978).

Green v. County School Board, supra, 391 U.S. 441-42, 88 S.Ct. 1689, 1696, 20 L.Ed.2d 716; *NAACP v. Lansing Board of Education*, 559 F.2d 1042, 1052 (6th Cir.), cert. denied, 434 U.S. 997, 98 S.Ct. 635, 54 L.Ed.2d 491 (1977).

On the record presented, we cannot determine whether the Board has demonstrated that Phase III represents the maximum desegregation practically achievable. Until that finding is made by the district court, jurisdiction is retained. Furthermore, since "the most exacting form of review" is required when a plan may disproportionately burden the minority group which was the target of intentional discrimination, *Parent Association of Andrew Jackson High School v. Ambach*, 598 F.2d 705, 717 (2d Cir.1979), more comprehensive findings must be made on this issue.

Remanded.

APPENDIX B

Decision and Order Dated May 19, 1981

UNITED STATES DISTRICT COURT

Western District of New York

GEORGE ARTHUR, *et al.*,

Plaintiffs,

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

Civ-1972-325

Appearances:

Jay, Klaif & Morrison (David G. Jay, Esq., of Counsel), Buffalo, New York, for Plaintiffs.

Joseph P. McNamara, Esq., Corporation Counsel of the City of Buffalo (Aubrey McCutcheon, Esq., Special Counsel, William E. Carey, Esq., Assistant Corporation Counsel, and James P. Caher, Esq., Deputy Corporation Counsel, of Counsel), Buffalo, New York, for Mayor James D. Griffin, Superintendent of Schools Eugene T. Reville, The Board of Education, and the Common Council of the City of Buffalo, defendants.

James A. W. McLeod, Esq., Buffalo, New York for Plaintiff-Intervenor Citizens for Quality Education.

Jaeckle, Fleischmann & Mugel (J. Edmund deCastro, Jr., Esq., of Counsel) Buffalo, New York, for Plaintiff-Intervenor Puerto Rican Legal Defense and Education Fund.

Serotte, Harasym & Reich (Bruce A. Goldstein, Esq., of Counsel) Buffalo, New York, for Plaintiff-Intervenor John Bushey.

Robert Clearfield, Esq., Buffalo, New York, for Intervenor Buffalo Teachers Federation.

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> [2] "We support integration as the priority education strategy; it is essential to the future of American society. In this [1967] summer's disorders we have seen the consequences of racial isolation at all levels, and of attitudes toward race, on both sides, produced by three centuries of myth, ignorance, and bias. It is indispensable that opportunities for interaction between races be expanded."

Report of the National Commission on Civil Disorders, at 25 (Bantam ed. 1968).

There has been much progress in race relations since this statement was written, particularly in Buffalo. However, we must remain circumspect as too many students of history, beginning with deTocqueville, have predicted that this issue would bring down The Republic.[1] No community or community leader can remain sanguine while skin color remains a political issue.

Ever since the finding of this court in 1976 that the defendants had for many years intentionally caused and maintained a segregated school system, the defendants have been under court order "to come forward with a plan that comports with the Constitution" that would remedy the segregation in the Buffalo public schools which remains from the past. From the outset, the primary responsibility for producing such a plan has been with defendants. The court has repeatedly acknowledged that "it does not have the specialized training, the knowledge or the experience that belong to defendants." *Arthur v. Nyquist*, 415 F. Supp. 904, 969 (1976). The limited nature of the court's function has been clearly delineated by the United States Supreme Court:

> [3] [T]he initial responsibility for devising an adequate desegregation plan belongs with the school authorities, not with the District Court. *The court's primary role is to review the adequacy of the school authorities' efforts and to substitute its own plan only if and to the extent they default.*

Milliken v. Bradley, 418 U.S. 717, 809 (1974) (Marshall, J., dissenting) (emphasis added).

The task before the court today, as it has been three times before in this litigation, is to review the adequacy of the Board of Education's plan, Phase IIIx.

In each of the plans put into effect since 1976, steady and impressive progress has been made in developing a final plan for remedying past segregation. The most recent plan which was put into operation, dubbed Phase III, was tentatively approved by my orders of June 19, 1980 and August 8, 1980. The court specifically conditioned its approval of the Phase III plan upon defendants continuing to meet with plaintiffs in an effort to resolve their differences. In addition, the court reserved decision on plaintiffs' motion to set a date of September 1981 by which all schools in Buffalo must be desegregated "pending consideration of the progress of the settlement discussions." Order of June 19, 1980 at 4.

Notices of appeal were filed on July 18 and August 12, 1980 by plaintiffs. This ousted the district court of jurisdiction.[2] Oral argument took place before the Court of Appeals on December 12, 1980. On January 5, 1981, the Court of Appeals remanded the case back to the district court with instructions to make specific findings of fact. *Arthur v. Nyquist*, 636 F.2d 905 [4] (2d Cir. 1981). It also noted *in passim* that "too many years *have elapsed*

since this litigation commenced." Id. at 905. From this and other observations by the Court of Appeals, it is obvious that time is of the essence in finding a final remedy.

In light of these comments, the district court *in camera* again asked the defendants to speed up the time schedule in their Phase III proposal, in the hope that a settlement might be reached and need for further recourse to the Court of Appeals obviated. At the same time this court advised the parties that their detailed assistance would be required in drafting proposed findings of fact.[3] Vigorous negotiations ensued. There was much behind-the-scenes cooperation between parents, teachers, plaintiffs, and the Board of Education and its staff. As a result of these discussions, the Board proposed an expedited version of its earlier Phase III plan dated January 27, 1981 ("Phase IIIx"). It was approved by a majority of the Board on February 4, 1981. If ordered into place, this plan would impose fixed assignments effective September 1981.[4]

Plaintiffs subsequently were given an opportunity to critique the plan in writing; a response was filed on March 5, 1981.[5] In the interim, the Board passed a resolution (1) directing that the court be informed of the decreasing likelihood of its being able to implement the Phase IIIx proposal and (2) requesting a year's delay in its implementation "in order to get the plan set."[6] *See* "Excerpt From Board Meeting of 2/18/81," Exhibit 673 at 1 and 5.

[5] As a result of the negotiations, the parties prepared a number of orders for the court's signature. On March 27,

1981, the court issued an order setting forth the three alternative school desegregation plans which had been proposed by the parties. The court directed that there be a public hearing on the three alternative proposals. The hearing took place on April 7, 1981 and lasted an entire day. The defendants presented testimony as to why implementation of the Phase IIIx plan should be delayed until September 1982. There was also much discussion of Schools 43 and 78. Mr. Eugene Reville, the Superintendent of Schools, explained that the Board would be in a better position to implement the plan in 1982. He stated that the Board would be able to demonstrate to the community the success of its Early Childhood Center and academy programs, thereby convincing parents to send their children voluntarily to the affected schools. He argued that this would be consistent with the court's directives to date. However, both he and Mr. Joseph Murray, the Associate Superintendent of Schools, conceded under cross-examination that the Board of Education would be able to implement the Phase IIIx plan as originally proposed for September 1981, if ordered to do so.

By decision filed April 16, 1981, the court rejected the plan which would have in effect exempted Schools 43 and 78 from the overall systemwide fixed assignment plan. This had the effect of eliminating one of the three orders. It did not put any order in place.

[6] All of the parties have now come to the court asking that we decide whether to order implementation of the Phase IIIx plan for September 1981 as originally proposed, or to grant another year's delay, as the Board now requests.

If either of these plans is to work, speedy action is required. The court has learned over the course of the many years of this litigation that successful integration of the schools requires careful planning by the Board's staff. It is important that as much advance notice as possible be given so that logistical and technical problems may be anticipated, and thereby avoided. The Board must have opportunity to meet with students and parents now, before the summer, so that an orderly transition to Phase IIIx can be accomplished, if the plan is ordered for September 1981. In my judgment, it is therefore essential that all legal hurdles be alleviated and a decision rendered now on this key issue. Every day counts.

Law

The direction of the United States Supreme Court and of the United States Court of Appeals for the Second Circuit is school desegregation cases is clear. Once there has been a finding of intentional segregation of the public schools, the district court must direct the "maximum desegregation practically achievable." *Arthur v. Nyquist*, 636 F.2d 905, 907 (2d Cir. 1981). The Supreme Court, per Brennan, J., has said:

> The burden on a school board is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

Green v. County School Board, 391 U.S. 430, 439 (1969) (emphasis in original). In this very case, the Court of Appeals has said [7] that the timing of the remedy in such cases is "of the utmost constitutional importance." *Ar-*

thur v. Nyquist, 636 F.2d *supra* at 906. If the scope of the intentional segregation which occurred was systemwide, then the remedy must match the violation and also must be systemwide. *Columbus Board of Education v. Pennick*, 443 U.S. 449 (1979); *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); *Reed v. Rhodes*, 607 F.2d 714 (1979), *cert. denied* 445 U.S. 935 (1980). The district court must evaluate the School Board's plan to determine whether it has "real prospects for dismantling the state-imposed dual [school] system 'at the earliest practicable date. . . .'" *Green v. County School Board*, 391 U.S. 430, 439 (1967). There comes a time, however, when so-called freedom of choice plans will not be sufficient.

> Where [a freedom of choice plan] offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. *On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, "freedom of choice" must be held unacceptable.*

Green v. County School Board, supra at 440-41 (emphasis added).

In short, *the heavy burden on the School Board in the instant proceeding is to demonstrate why the very plan it proposed, in response to the court's order, should not be placed into effect as originally proposed.* At the same time, it must be observed that the constitutional command to desegregate schools does not mean that every

school in every community must [8] always reflect the racial composition of the school system as a whole. *Swann v. Board of Education*, 402 U.S. 1, 24 (1970).

Analysis

Plaintiffs have pointed out a number of areas where the plan could be made more efficient in integrating the schools. They maintain that there is a disproportionate burden placed on minority children and that particular minority communities are completely without local schools. They argue that in a school system with approximately equal numbers of majority group and minority group youngsters, there should be no all-minority or almost all-minority schools. They remind the court that a number of schools, variously put between four and eight, would remain disproportionately minority even under the Phase IIIx plan. They argue that provision should be made in the event that pre-Kindergarten classes are discontinued. Not without reason, they argue that it is unjust to insist that minority children be forced to carry the weight of a remedy brought on by unconstitutional actions taken by the School Board against other minority children. As is made clear by their papers filed with the Court of Appeals and with this court, the plaintiffs would, given their way, have the court go considerably beyond Phase IIIx.

The Board is similarly dissatisfied. The Phase IIIx plan with its implementation date of September 1981 was issued in direct response to court order. The subsequent resolution makes clear, if there were any doubt, that this was not the Board's preferred course of action. It remains plain that, [9] left to its own devices, the Board

would not have employed any compulsory integration techniques. In fact, the school district's considerable success with voluntary integration techniques has been itself held up as reason enough to foreclose any mandatory pairing, clustering, or the like.

The court, early on in these proceedings, warned the Board that if it did not comply and commence the preparation of a desegregation plan, one might have to be implemented, not of its own making. *See* Order of April 30, 1976 at 153. Fortunately, the Buffalo Board's statesmanlike cooperation throughout the course of this litigation removed the need for the court to resort to other means of implementing its desegregation orders. It is with this background that the Board approved Phase IIIx.

The compromises by both sides have been considerable. By conceding its ability to implement Phase IIIx in September 1981, the Board has taken a long step toward accommodating plaintiffs' position. By plaintiffs giving their support to the Phase IIIx plan's implementation in September 1981, they have also abandoned important principles in the name of peaceful resolution of this dispute. The parties on all sides have given the court reason to believe that a comprehensive settlement might be achievable if an order would issue now. This would make time-consuming fact-finding unnecessary. It would also speed a final settlement of this long, difficult lawsuit. This would mean that the amicable resolution of the major issues in this lawsuit, which this court has so long endeavored to obtain, [10] would be at hand. In addition, the primary complaint of plaintiffs in their appeal was the court's failure to make firm the Board's proposed

date of September 1981 as the date of implementation of the fixed assignment plan. This was an important factor in the Court of Appeal's very decision remanding the case back to this court. Deciding the timing issue now would speed matters to their conclusion consistent with the spirit of that order.

Another advantage of such a settlement would be that parents and students would be better able to know where their children will attend school in future years. This would allow them to make their plans accordingly and would eliminate the burden of uncertainty. It would also allow the Board and its staff to better plan how to allocate scarce resources. Most importantly, the upsetting nature of this controversy would be at an end with imposition of a fixed plan.

Decision

The court is convinced that the advantages to implementing Phase IIIx for September 1981 exceed the reasons for further delay. Primarily, the court is satisfied that this plan will maintain quality education by further progressive educational innovation, while at the same time furthering the goal of equal educational opportunity. The School Board has shown that the Early Childhood Center and magnet programs can provide students with an excellent education. The pedagogical creativity and academic achievement displayed by these programs has merited the participating schools a high regard in the [11] community and has generated some fairly long waiting lists for admission to them. The proposed academies, which are the new 3-8 grade schools, are de-

signed to be an important supplement to this existing, largely successful educational structure. It is worth observing that on these points, there is no dispute whatsoever among the parties in this suit.

The court's careful examination of the integration process to date leads inescapably to the following conclusion. The Board seems to have achieved the maximum success possible by use of voluntary measures such as magnets. In the 1980-81 school year, both the Martin Luther King and Futures Academy magnet schools were significantly outside the court's parameters for a desegregated school (30%-65% minority). This was despite these schools' having acknowledgedly strong educational programs, proven track records, and the Board having undertaken special recruiting efforts. The law requires that if the court concludes there are reasonably available ways of integrating the school system which promise to be speedier and more effective than freedom-of-choice measures, then it must impose them. The Board has offered no persuasive reasons why it believes that it would be more successful in this endeavor next year.

There is no guarantee that there would be any significant difference in the circumstances in which the Board would find itself then. It is true that the Board would have had another year to demonstrate the success of its Early Childhood Center and magnet approach. However, the success [12] of the program is evident. The community has had substantial familiarity with these programs for over two years. The Phase IIIx plan has been well circulated and discussed in the press. Indeed, many parents active in their school communities participated in its

preparation through the numerous Board-sponsored community meetings. They cannot be heard to say now that the plan is a surprise, or that they doubt its educational strength. In short, the court is satisfied that the plan can work *now*. This is particularly important because this lawsuit has been pending since June 1972 and has been in the remedy phase since April 1976.

It has of late been argued by some that the Board's current financial troubles require a year's delay. The court record is barren of any formal evidence of this objection. More importantly, it is certainly not a problem likely to be resolved by next year. On the contrary, it is the court's experience that disputes among the Common Council, the Mayor, and the Board are part of the democratic fabric of our community. For the purposes of this lawsuit, the court must assume that the defendant Council will do its duty and provide adequately for the Board's integration efforts. As the court noted in its original liability decision.

> This court cannot allow the Common Council and the Board to avoid liability by pointing the finger at each other.

Arthur v. Nyquist, 415 F. Supp., *supra* at 969.

On the other hand, the Board would have an extremely difficult task proving to a preponderance of the evidence that [13] because of budget reductions imposed on it, *no* integration plan could be entered. I note, in this regard, that by the Board's own estimates, only 3,000 additional students will be added to the 25,000 who are currently, largely voluntarily being, transported. This is hardly a massive number. It is also worth observing that if infla-

tion continues to rise and the size of our student community continues to decline, then implementing the plan as soon as possible would certainly be the wiser course.

The court also believes that community acceptance, upon which any plan necessarily depends, will be forthcoming this year as likely as next. There is no doubt that the Phase IIIx plan, no matter when implemented, will be unpopular in some quarters. However, the community has participated at every phase of this lawsuit. In the period immediately after the liability decision in 1976, a number of court-sponsored public hearings were held throughout the City. The same process was repeated on a more limited basis under the auspices of the Board before both the Phase II and Phase III plans were submitted. Throughout the course of this litigation, Mr. Robert White, Deputy Clerk of the Court, has made available all communications which have been sent to the court to the parties. *See* Order of May 19, 1976. As noted earlier, on April 6, 1981, the court itself held public hearings at which time community comments were solicited. Although the testimony taken concerned Phase IIIx as a whole, the public comments [14] received almost exclusively concerned Schools 43 and 78. The more generalized comments received were in the nature of unspecified opposition to all integration efforts. In view of the finding of intentional segregation, the court clearly cannot respond to such observations in any fashion. Also important, the total number of comments was small, both in absolute terms and especially when compared with the number of children in the school system. This reflects the fact that the School Board and the court have made every effort to acquaint the affected schools and parents with their role in the proposed plan.

Finally, this is not a matter of discretion for the court. Under law, the court *must* order implementation of any plan which assures the "maximum desegregation practically achievable." In this case, the Board has admitted that it can implement the Phase IIIx plan, which it itself proposed, in September 1981. Consequently, as to the simple expedient of choosing between the two remaining proposed orders, the court's choice is compelled by the parties themselves. Both the Board and the plaintiffs agree that the Board can implement the very plan it produced, using the timetable it suggested. Once the court ascertains that the Board can physically implement the plan by September 1981, as both parties agree it can, the court has no choice but to direct implementation for that date.

[15] **Conclusion**

The issuance of this decision reflects the beginning of the end of this school desegregation case. It is not, however, a final order in the sense that there will be no more. *Cf.*, 28 U.S.C. §1291. The court anticipates that some problems will arise in the implementation of the Phase IIIx plan in September and that the court may have to become involved in resolving them. There will also be need to review the success of Phase IIIx. In addition, a number of other issues remain, including: the monitor proposal, attorneys' fees, appointment of probationary teachers, preserving a balance at Kensington High School, and the treatment of Hispanic and handicapped students. Most importantly, there is the question of the status of the schools which will remain outside the court's parameters for being deemed desegregated, even

if the Board's own projections are correct as to the school enrollments under Phase IIIx in September 1981. The court anticipates that most of these problems can either be resolved by the parties themselves or by the court on papers presented by both sides *before* the end of the summer. The question of the success of Phase IIIx will be reviewed by the court in November 1981. If these issues are satisfactorily resolved during the summer and if implementation of Phase IIIx goes according to the plan at this time, the court can anticipate issuing a truly "final order" in January 1982.

[16] **Order**

The court, having received the Board's submission styled Phase IIIx and plaintiffs' response dated March 5, 1981, and all parties having had an opportunity to comment on all aspects of Phase IIIx, and the court having determined that, in part, Phase IIIx advances the objects of this action in desegregating the Buffalo Public School system at the earliest practicable date, it is therefore

ORDERED, that the Board implement fixed assignments as to the schools indicated in the clusters appearing on page 49 of the Board of Education's Phase IIIx plan (Exhibit 613), with clustered schools to house either grades pre-Kindergarten-2 or 3-8, and the addition of School 51 to the 23/42/52 cluster (pp. 67-69, Exhibit 613), said assignments to be implemented for the school year commencing September 1981, provided that voluntary applicants from school districts within the Early Childhood Center clusters shall be placed in their district cluster school; and it is further

ORDERED, that Early Childhood Center programs be established at Schools 53 and 74 to which applicants from school districts not associated with other Early Childhood Center clusters may be assigned, provided that such assignments contribute to desegregation of Schools 53 and 74 and do not contribute to segregation of schools in the district in which applicants reside; and it is further

ORDERED, that the parties shall meet and discuss all remaining issues in this case including, but not limited [17] monitor proposal, attorneys' fees, Kensington High School, Hispanic intervenors, and handicapped intervenors and report to the court in writing no later than June 30, 1981 as to their respective positions; and it is further

ORDERED, that the Board shall provide a detailed written report on the operation of Phase IIIx, including any major operating problems which arise, on or before November 1, 1981. Plaintiffs shall reply to the report within three weeks of their receiving it. The court will convene a meeting soon thereafter so that a final order or findings of fact may be issued in January 1982.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: May 19, 1981

[i] **Footnotes**

[1] *See* I *Democracy In America*, 370-79 (1862 Bowen trans.) (Vintage ed. 1945).

[2] The Court of Appeals said, "Until that finding is made [that Phase III represents the maximum desegregation practically achievable] by the district court, jurisdiction is retained." The court believes there is a question as to whether it has jurisdiction, since the matter was remanded back for only a limited purpose, pending findings. However, *all* counsel, particularly counsel for plaintiffs and defendant Board, have strenuously argued that we do have jurisdiction and have urged us to enter an order deciding what course to follow for September 1981. The parties have also consented to a delay in our filing comprehensive findings of fact. *See generally*, n. 3, *infra*. Because our decision is in the nature of findings as to the maximum integration practically achievable for September 1981, and is generally in accord with appellant's position before the Court of Appeals, we have agreed to act.

[3] I orally directed the parties to commence preparation of proposed findings of fact even while negotiations continued as early as our meeting of January 13, 1981. I indicated that because of the court's calendar problems, detailed assistance from each side would be required. Moreover, I asked the defendant Board of Education to assign members of its staff to assist in the preparation of findings. I repeated these instructions in a scheduling order filed on the following day. *See* Order of January 14, 1981.

The court held another meeting with the attorneys in chambers on February 5, 1981. The attorneys argued plaintiffs' motion dated January 14, 1981 to set deadlines of March 12, 1981 for submission of proposed findings and May 21, 1981 for the "date of decision." During the argument, the court repeated its concern that the proposed findings be submitted with dispatch. In a decision dated February 17, 1981, I subsequently decided to defer ruling on that aspect of plaintiffs' motion which would have had the court set deadlines, as the plaintiffs at that point had not yet had an opportunity to analyze the latest Phase IIIx plan nor the most up-to-date data. I explicitly indicated both at the meeting and in the subsequent written order that I would again assess the differences still separating the parties at the subsequent March 5 meeting. In addition, I [ii] outlined in the specific

findings which would be necessary with respect to each of the questions raised by the Court of Appeals in its order. *See* Order of February 17, 1981, at n.1.

Once again, the court met with the parties on March 5, 1981. Most of this meeting took place in open court. Both during the meeting and by subsequent scheduling order, the court reiterated the need for findings in the event the parties could not resolve their areas of disagreement. The order stated: "The court again reminds the parties, particularly the defendants, that proposed detailed findings of fact will be necessary unless this matter is resolved quickly." *See* Order of March 16, 1981, at page 2.

My reasoning for requiring the assistance of counsel was based on several grounds. First, in any case of this length and complexity the court must be aided in reviewing the massive record. I note that the court files in this ten-year-old lawsuit have consumed nine file cabinets in my courtroom and chambers.

Second, the general calendar congestion of this court has continued to worsen in the past year. For example, in March 1981, a not untypical month, there were 110 criminal and 1,400 civil cases on the Western District of New York docket. This is roughly 35 criminal cases and 470 civil cases per judge. In addition, a major securities acquisition case came on my calendar in January and has already acquired considerable judge time. *Buffalo Forge v. Ampco-Pittsburgh*, Civ. 81-29. *See* Orders of January 9, 12, 15, 26; February 17, 23; March 5, 1981. *See also, Buffalo Forge v. Ampco-Pittsburgh, supra*, 638 F.2d 568 (2d Cir. 1981). I have also had need to devote increasing attention to important questions which have arisen in the so-called Love Canal litigation. *United States v. Hooker Chemicals and Plastics*, Civ. Nos. 79-987, 79-988, 79-989, and 79-990.

Finally, during the fall of 1980 and winter of 1981, Judge Harold P. Burke was engaged in a lengthy criminal trial which prevented him from attending to the many other matters on the Rochester docket. Subsequently, Judge Burke took ill in February and has not been able to pursue his judicial duties since then. He has elected to take senior status effective June 15, 1981. Although Judge John T. Elfvin and I have divided supervising Judge Burke's Rochester cases, it is clear that two judges cannot give as much attention to the district's caseload.

[iii] [4] The IIIx proposal states:

> We feel that we cannot complete the Buffalo Public School desegregation program until the end of the 1982-83 school year.
>
> If the Court orders fixed assignments for September, 1981, all schools involved in the Early Childhood Clusters will be balanced in all grades. . . .

See Buffalo Public Schools, Phase IIIx, Exhibit 627 at p. 49.

[4] Plaintiffs' response to Board of Education submission of February 5, 1981 entitled "Buffalo Public Schools Phase IIIx January 27, 1981 Revised," at pp. 24-25:

> Plaintiffs find the Board's "Phase IIIx Revised" Proposal of January 27, 1981, acceptable with the following provisions:
>
> 1. Desegregation of all elementary and high schools within Court-ordered guidelines shall be implemented by September 1981; and,
>
> 2. The ECC clusters as proposed (pp. 41, 67-69) are acceptable if:
>
> a. The Board retains PK as an integral part of the program or adds third grade, and
>
> b. ECC volunteers from non-clustered schools shall be placed at ECCs #53 and #74, providing such transfers contribute to desegregation, and
>
> c. Closed #23 students are allowed to attend a desegregated school in the neighborhood for part of their elementary years; and
>
> 3. All freedom-of-choice programs shall be given appropriate cut-off dates (April 1, 1981 for ECCs #53 and #74; May 31, 1981 for magnets #37, #39 and #59) and back-up student assignment plans, if necessary; and
>
> 4. The Board shall develop and implement policy and procedures on student transfers and acceptances to the optional magnet, ECC, and [iv] vocational schools to enhance and preserve desegregation in sending and receiving schools, as defined above; and
>
> 5. QIE shall be eliminated, but a majority-to-minority program, as defined above, is permissible once a comprehensive student assignment plan is in place; and
>
> 6. The Board shall develop and submit a comprehensive report on its proposed educational support programs, as defined above, by June 1, 1981.

[6] As was stated by Superintendent Eugene Reville, in his testimony on April 7, 1981, the court notes that this second resolution by no means rescinds the Board's Phase IIIx proposal. However, it is clear that a majority of the defendant Board prefers to delay implementation of Phase IIIx until September 1982.

At the hearing, Mr. Reville testified approximately as follows:

> It was my understanding that the Board of Education voted for [implementation of the Phase IIIx Plan for] both . . . September of this year and September of next year, but showed a preference for September of '82. And it's clearly stated on the record that this was not any opposition to the plan that was devised by the staff. It was because . . . a desire to be certain that the plan was successful. In order to be successful, there needed to be more time.

APPENDIX C

Notice of Motion and Supporting Affidavits

UNITED STATES DISTRICT COURT

Western District of New York

GEORGE ARTHUR, *et al.*,

Plaintiffs,

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

Civ-1972-325

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of Joseph P. McNamara, Corporation Counsel of the City of Buffalo, and the annexed affidavit of James D. Griffin, Mayor of the City of Buffalo, both affidavits sworn to June 2, 1981, a motion will be made on behalf of James D. Griffin, on June 15th, 1981, at the Federal Courthouse, Buffalo, New York, for an adjudication that:

1. James D. Griffin, as Mayor of the City of Buffalo, is an aggrieved party to this action with standing to appeal this Court's Order of May 19, 1981; and

2. For an order amending this Court's Order of May 19, 1981, so as to permit an appeal to be taken by James D. Griffin, as provided by the Rules of Judicial Procedure, 28 USCA, Sec. 1292(b).

Dated: Buffalo, New York
June 2, 1981

Respectfully submitted,

JOSEPH P. McNAMARA
Corporation Counsel
Attorney for the Mayor of the City of Buffalo
Office & P.O. Address
1100 City Hall—65 Niagara Sq.
Buffalo, New York 14202
(716) 855-4343

To:

Jay, Klaif & Morrison (David G. Jay, Esq., of Counsel), *Attorneys for Plaintiffs.*

James A. W. McLeod, Esq.,
Attorney for Plaintiff-Intervenor Citizens for Quality Education.

Jaeckle, Fleischmann & Mugel
(J. Edmund deCastro, Jr., Esq. of Counsel),
Attorneys for Plaintiff-Intervenor Puerto Rican Legal Defense and Education Fund.

Serotte, Harasym & Reich
(Bruce A. Goldstein, Esq., of Counsel),
Attorneys for Plaintiff-Intervenor John Bushey.

Robert Clearfield, Esq.,
Attorney for Intervenor Buffalo Teachers Federation.

Appendix C—Notice of Motion and Supporting Affidavits.

Affidavit of Joseph P. McNamara

UNITED STATES DISTRICT COURT

Western District of New York

GEORGE ARTHUR, *et al.*,

Plaintiffs,

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

State of New York
County of Erie
City of Buffalo } ss.:

JOSEPH P. McNAMARA, being duly sworn, deposes and says:

1. I am Corporation Counsel of the City of Buffalo, and I make this affidavit on behalf of the Mayor of the City of Buffalo.

2. By Order dated May 19, 1981, this Court directed that fixed student assignments be made as to the schools indicated in the Clusters appearing on page 49 of the Buffalo Board of Education's Phase IIIx Plan and as to School 51, said assignments to be implemented for the school year commencing September, 1981. At page 15, the decision of this Court expressly states that the Order is not a "final order" appealable under 28 USC, Sec. 1291.

3. It is respectfully submitted that the aforesaid Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation.

4. In candor, however, I must point out to the Court that this application is brought solely on behalf of the Mayor of the City of Buffalo, and there is a question as to whether the Mayor has standing to appeal this matter.

5. In the Decision and Order of this Court dated April 30, 1976 (see United States Court of Appeals, Joint Appendix, Vol. II, pages 1030-1226) at pages 126 and 127, this Court stated:

> "e. *Mayoral Action.* At the time this suit was filed, School Board members were appointed by the Mayor, subject to the confirmation of the Common Council. [New York Education Law, Sec. 2553(3) (McKinney's 1970)] The plaintiffs allege that the late Mayor Frank A. Sedita's appointment of Mrs. Carol Williams to the Board of Education in early 1972 was done with segregative intent. This appointment occurred just after Commissioner Nyquist had requested the Board to submit an integration plan that would effect a racial balance in each school approximating the district-wide percentage.
>
> As the Supreme Court stated in *Mayor of Philadelphia v. Educational Equality League,* 415 US 605 (1974), such an allegation presents a sticky judicial and legal problem because 'judicial oversight of discretionary appointments may interfere with the ability of an elected official to respond to the

mandate of his constituency.' 415 US, at 615. Because the Supreme Court ruled that there was no proof of discriminatory appointments in the *Mayor of Philadelphia* case, it did not resolve this problem. 415 US, at 621.

In the present case, the only evidence of the Mayor's intent is a quote from a letter he once wrote indicating that he appointed Mrs. Williams because she was opposed to cross-bussing. [S-130(b)]. We feel that this is insufficient evidence to find discriminatory intent on the part of the Mayor."

6. At page 152 of the Decision and Order the Court stated:

"It is the finding of this court that the Board of Education, the Superintendent of Schools, the Commissioner of Education, and the Board of Regents have violated the plaintiffs' fourteenth amendment right to equal protection under the laws by intentionally causing and maintaining a segregated school system."

7. The aforesaid provision was corrected by order of this Court dated June 3, 1976 (see Appendix, pages 1227, 1228) to read:

"It is the finding of this court that the Board of Education, the Superintendent of Schools, *the Common Council*, the Commissioner of Education, and the Board of Regents . . . [Emphasis added]

8. It appears from the foregoing that the Mayor was not found to have violated the constitutional rights of the plaintiffs, and therefore is not directly subject to the subsequent orders of the Court in this action.

9. As is more fully set forth in his own affidavit attached hereto, the Mayor is in fact "aggrieved" by this Court's May 19, 1981 Decision and Order.

WHEREFORE, it is respectfully requested that this Court adjudge that the Mayor is an aggrieved party to this action with standing to appeal, and further that this Court's Order of May 19, 1981 be amended so as to permit such an appeal.

JOSEPH P. McNAMARA.

Sworn to before me, this 2nd day
of June, 1981.

Commissioner of Deeds in and for
the City of Buffalo, New York
My Commission Expires 12/31/82

Appendix C—Notice of Motion and Supporting Affidavits.

Affidavit of James D. Griffin

UNITED STATES DISTRICT COURT

Western District Court

GEORGE ARTHUR, *et al.*,

Plaintiffs.

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

State of New York
County of Erie
City of Buffalo } ss.:

JAMES D. GRIFFIN, being duly sworn, deposes and says:

1. I am Mayor of the City of Buffalo and I make this affidavit in support of my request for permission to appeal this Court's Decision and Order of May 19, 1981.

2. The Corporation Counsel of the City has advised me that there is a question as to whether I have standing to take this appeal because, in a strictly legal and technical sense, I may not be "an aggrieved party". I respectfully submit that as a matter of fact and in a very real and practical sense, I am affected by and therefore am a person "aggrieved" by this Court's Order.

3. When I took office, I made a pledge to the residents of this City that I would turn the City around by preserving present employment opportunities,

creating new opportunities through economic development programs, improve the quality of life through the development of a downtown theater district and waterfront; and I promised to halt further erosion of the City's real property tax base. Two critical items in drawing people back to the City are: one, a quality public school system; and two, our ability to furnish essential City services adequately. I respectfully submit that this Court's May 19th Order seriously endangers our ability to provide both.

4. As Mayor, I have always believed that the City must be able to offer quality education to all children, without regard to race, color, creed or national origin. I also believe in freedom of choice as far as education is concerned. It is unrealistic to think that we can successfully attract parents with children into the City when there is lack of confidence in our school system.

5. I am a person "aggrieved" by this Court's decision in that it is I who must make difficult fiscal decisions balancing the financial needs of our public schools against the need to fund essential City services such as police and fire protection, garbage collection, street cleaning, etc. At this time I do not know how serious the financial impact of the Court's Decision is, but any significant impact could seriously jeopardize our ability to provide essential City services. This is particularly true, in light of the fact that the New York Court of Appeals has apparently ordered the City to refund taxes which were unconstitutionally levied in the years before I took office.

6. One of my foremost objectives when I assumed office was to stabilize and increase the City's real property tax base so as to be better able to provide both quality education and quality City services. We have been remarkably successful in this area, but any actual or perceived impairment of the quality of the education offered by the public school system frustrates our efforts, and in fact can have a spiral effect, to wit: lack of confidence in the public school system discourages those considering moving into the City, potential real estate tax revenues are hereby lost; there is less money to spend on public education; the quality of education declines; and so on.

7. I am seeking an order of this Court granting me status as an aggrieved person with standing to appeal because I do not want the City to suffer the cost of a futile appeal and further, I do not wish to unnecessarily cause our citizens to be in doubt over the outcome of this matter for an extended period of time if there is no likelihood of ultimate success.

8. Through the use of voluntary measures the Board of Education has been extremely successful in desegregating our schools. I believe that it is unnecessary and premature at this time to order mandatory fixed assignments. The School Board itself requested that voluntary measures be continued for at least one more year, and I agree. These measures have been successful in the past and should at least be permitted to continue for one more year.

9. In summary, I respectfully submit that as Mayor of this City I am committed to revitalizing our City, restoring its tax base and providing essential municipal services; and because of this, I am a person "aggrieved" in fact by this Court's Order of May 19, 1981, and therefore should be granted standing to appeal.

JAMES D. GRIFFIN

Sworn to before me, this 2nd day
of June, 1981

Commissioner of Deeds in and for
the City of Buffalo, New York
My Commission Expires 12/31/82

APPENDIX D

Order Dated June 2, 1981

UNITED STATES DISTRICT COURT

Western District of New York

GEORGE ARTHUR, *et al.*,

Plaintiffs,

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

Civ-1972-325

A motion has been made by Attorney James Caher on behalf of James Griffin, Mayor of the City of Buffalo. Because the motion concerns the possibility of an appeal from this court's order of May 19, 1981, it is important that it be heard and decided before the 30-day appeal period has run. Rule 4, Rules of Appellate Procedure. For this reason, the motion shall be heard at 9 a.m. on June 8, 1981.

Because the motion raises technical procedural issues, the court directs the movant, the defendant School Board, and the plaintiffs to file brief letters setting forth the law on or before June 5, 1981.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: June 2, 1981

APPENDIX E

Letter from Joseph P. McNamara
Dated June 5, 1981

(seal) CITY OF BUFFALO

Department of Law

HAND DELIVER

June 5, 1981

Hon. John T. Curtin
United States District Court
Western District of New York
United States Courthouse
Buffalo, New York 14202

RE: ARTHUR, et al. v. NYQUIST, et al.
CIV-1972-325
MOTION TO CERTIFY QUESTION FOR APPEAL

Dear Judge Curtin:

POINT I

JAMES D. GRIFFIN, AS MAYOR OF THE CITY OF BUFFALO, IS AN AGGREIVED PARTY WITH STANDING TO APPEAL THIS COURT'S ORDER OF MAY 19, 1981

Mayor James D. Griffin apparently is not directly subject to this Court's Order of May 19, 1981. Nonetheless, the Mayor is in fact aggrieved by that Order and should have standing to appeal it.

In approaching the question of "standing", the United States Supreme Court has applied the following question and analysis:

Appendix E—Letter from Joseph P. McNamara Dated June 5, 1981.

"Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing."
Baker v. Carr, 369 US 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Akron Board of Education v. State Board of Education of Ohio*, U.S.C.A. 490 F2d 1285 (U.S.C.A. Sixth Cir., 1974).

It is respectfully submitted that James D. Griffin, as Mayor of Buffalo, has such a personal stake in this matter. Mayor Griffin has said, in his affidavit (submitted in support of his motion of June 2, 1981 in this matter) that he is, in fact, aggrieved by this Court's Order of May 19, 1981. The Mayor's affidavit indicates that he is aggrieved by the financial impact of the May 19th Order by virtue of his position as Mayor of the City of Buffalo. Clearly, the Mayor's "personal stake" in this matter is sufficient to assure the "concrete adverseness" which concerned the Court in *Baker v. Carr, supra.* Accordingly, Mayor James D. Griffin should be granted standing to appeal the May 19th Order of this Court.

Appendix E—Letter from Joseph P. McNamara Dated June 5, 1981.

POINT II

THE ORDER OF MAY 19, 1981 INVOLVES A CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION AND AN IMMEDIATE APPEAL FROM THE ORDER MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION.

The Rules of Judicial Procedure, 28 USCA, Sec. 1292(b), allows appeals from interlocutory orders not otherwise appealable, where the district judge indicates that his order involves a controlling question of law as to which:

> "... there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."
> See *State Teachers Retirement Board v. Fluor. Corp.*, 84 FRD 38 (DCNY 1979).

The instant case clearly involves an order over which a difference of opinion might exist [see *Katz v. Carte Blanche Corporation*, 496 F2d 747 (USCA, 3rd Cir., 1974)], since the order reflects the resolution of a hotly contested issue: what constitutes the maximum desegregation practically achievable, in this case, at this time. (See Order of May 19, 1981 in this action, p. 6).

It is also clear that the May 19th Order involves a controlling question of law. The issue of the "maximum desegregation practically achievable" at this time is, of course, a central issue in the remedy phase of this litiga-

tion. "Controlling" in this context has been defined as "...serious to the conduct of the litigation, either practically or legally". *Katz, supra,* at 755. By that standard, this order indeed involves a controlling question of law. Even if this question is construed as a mixed question of law and fact, such questions are freely reviewable when they meet the other criteria of Sec. 1292(b). *Ashland Oil Refining Co. v. Kenny Construction Co.*, 395 F2d 683 (6th Cir., 1968).

The third criterion of Sec. 1292(b) is that an immediate appeal may materially advance the ultimate termination of the litigation. In the instant case, immediate appeal would tend to advance the ultimate termination by avoiding the possibility of later appeal on the same question.

In addition to advancing the ultimate termination in this strictly chronological sense, this appeal might advance the termination in a more material sense. Assuming that the May 19th Order were reversed as to the September, 1981 implementation of the Phase III Plan, an additional year would be available to attempt extrajudicial means of settlement. In addition, delaying the implementation would avoid the economic and social impact to the City of Buffalo, described by the Mayor in his affidavit. Such factors could be seen as a basis for appeal under the reasoning in *Katz,* which indicated, "...the section [1292(b)] probably was intended to include others having ... potential for harm to the litigant pendente lite." *Katz, supra,* at 754.

Appendix E—Letter from Joseph P. McNamara Dated June 5, 1981.

This Court's Order of May 19th thus meets the criteria of U.S.C. Title 28, Sec. 1292(b) and should be amended to so certify.

Respectfully submitted,

JOSEPH P. McNAMARA
Corporation Counsel

JPMcN:CKR/kf

APPENDIX F

Letter from William E. Carey
Dated June 5, 1981

(logo) CITY OF BUFFALO

Department of Law

June 5, 1981

Hon. John T. Curtin
U.S. District Court Judge
U.S. Courthouse—Room 624
Buffalo, New York 14202

Re: Arthur, et al. v. Nyquist, et al.
Appealability of May 19, 1981 Order

Dear Judge Curtin:

The June 2, 1981 Order of this Court directs the Board and plaintiffs to file a brief letter on the law relating to the technical procedural issues raised by James Caher in his motion on behalf of Mayor James D. Griffin.

Notwithstanding the fact that the Court has unfettered discretion to deny Mr. Caher's motion by refusing to certify the May 19, 1981 Order for appeal, it is clear that the statutory criteria set forth in 28 USC 1292(b) and other practical criteria developed by the Federal Courts in implementing that statute would require the Court to deny the present application.

In Wright-Miller-Cooper-Gressman on "*Federal Practice and Procedure*", the author observed that in order to certify an interlocutory order for appeal, the District Court must find that that order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal

may materially advance the ultimate termination of litigation.

The author goes on to observe that a court should take into account the following practical criteria: A court should consider the need for lengthy appellate consideration before certifying an order for appeal; a court should also consider whether the appellate court will in fact affirm the order to be certified; a court should also consider whether a reversal of the order will substantially alter the responsibilities of the parties; and a court should also consider whether further proceedings in the district court would moot the issue without appeal.

Given the pertinent particular circumstances of this case, it appears to me that by any standard, statutory or practical, this Court must be constrained to deny this petition.

While extensive evidence, exhibits and legal memoranda were considered by this Court prior to its May 19, 1981 Order, a few major factors accounted for it being issued.

First, there was the most recent mandate of the Second Circuit Court of Appeals in which that Court observed that the "timing" of student desegregation was the most exacerabating issue between the parties and its consequent direction that desegregation must occur at the earliest practicable time.

Following the issuance of that Order, the parties made clear to the Court, and the Court subsequently agreed, that this be separated and resolved on an *interim* basis so that the parties could in an orderly way resolve the other important issues between them and before the

Court, i.e., affirmative action, schools which currently do not meet the Court's definition of a desegregated school, the need for and the functions of a monitor, etc.

The parties convinced the Court that this approach would allow both the Court and the parties to avoid the time-consuming task of developing extensive findings of fact and thereby advance the litigation to its conclusion. Having chose this approach, the Board of Education then proceeded to argue at length for a one-year extension of its voluntary movement strategy. In all candor, I must concede that if the Board had prevailed on that question, I would have vigorously opposed any appeal by the plaintiffs from such an interim order.

That being so, I am compelled by logic and out of a sense of fidelity to the Court, as its officer not to abandon that position in the face of an adverse determination. Moreover, when one considers the facts that transpired prior to the issuance of the May 19, 1981 Order and measures those particular facts and circumstances against the statutory and practical criteria referred to above, it is inescapable that this Court must deny the present application to certify its May 19, 1981 Order for appeal.

Therefore, all other matters raised by the moving party here become moot and, thus, the motion in its entirety should be denied.

Respectfully submitted,

WILLIAM E. CAREY
William E. Carey
Asst. Corporation Counsel

WEC/G

APPENDIX G

Letter from David Gerald Jay
Dated June 5, 1981

JAY, KLAIF & MORRISON

ATTORNEYS AND COUNSELORS AT LAW
1032 ELLICOTT SQUARE
BUFFALO, NEW YORK 14203

BARBARA MORRISON
LEONARD J. KLAIF
DAVID GERALD JAY

(716) 856-6300

June 5, 1981

Hon. John T. Curtin
U.S. District Judge
U.S. Courthouse
Buffalo, New York 14202

Re: Arthur v. Nyquist
Order dated June 2, 1981

Dear Judge Curtin:

Plaintiffs view the law applicable to the Mayor's Motion dated June 2, 1981, as follows:

1. There is now and has always been a conflict of interest in the representation of the so-called City Defendants (the Council) and the Board of Education by the same law office, *viz.*, the Corporation Counsel. See Code of Professional Responsibility, EC 5-1, EC 5-14, EC 5-21. In the present motion, the Corporation Counsel takes on an additional client, the Mayor, whose interests are apparently adverse to the *party* defendants, since the *party* defendants are not asking for §1292 (b) relief.

2. The Court, of course, can always add or drop parties at will. Fed. R. Civ. P. Rule 21.

3. Whether the Mayor is a person whose status as a party is necessary or proper is a decision which the Court should make in the exercise of its discretion. Fed. R. Civ. P. Rule 19(a). Plaintiffs question only whether he is needed as a party in view of the fact that any order issued by this Court to the parties defendant now present would have to be obeyed, notwithstanding Buffalo City Charter §38, giving to the Mayor veto power over the resolutions of the Common Council. U.S. Const. Art. VI, Cl. 2; *Martin v. Hunter's Lessee,* 1 Wheat. 304 (1816).

4. At present, since the Mayor's office (the Mayor in his official, as opposed to his individual capacity) was absolved from liability in the Court's April 30, 1976 decision, he is no longer a party. Non-parties have no standing to appeal, *Ex parte Cockcroft,* 104 U.S. 578 (1882), perforce, non-parties who have had unlimited opportunities to ask for party status or request intervention, cannot, subsequent to determinations they do not like, now ask to be heard. The doctrine of laches must be given some force and effect. See also *United States v. McFaddin Express, Inc.,* 310 F.2d 799 (2d Cir. 1962).

5. Even if the Court is disposed to grant the Mayor party status, a party can appeal only to protect its own interests, not the interests of a co-party. See, *e.g., United States v. 5.96 Acres of Land,* 593 F.2d 884 (9th Cir. 1979). If the Board has no request to certify a §1292(b) appeal, and the City Defendants are content, can the Mayor seriously contend that his interest is affected by the Order?

6. How can it be said that the Mayor, even if made a party, is aggrieved? *Lewis v. United States*, 216 U.S. 611 (1910). His generalized conclusions concerning fiscal problems are constitutionally deficient. The defendants *must* provide integrated education.

7. As to the merits of the Motion, assuming (1) that the Mayor can be made a party, (2) that he is a necessary party, (3) that he has standing, (4) that he is protecting his interest solely, (5) that he is aggrieved, (6) that there is no conflict of interest, and (7) that the Court of Appeals might grant him permission to appeal, how will giving him the power to petition the Court of Appeals for permission to appeal advance the resolution of this litigation? Such a move would in fact retard the litigation:

> "What do you know about this business?" the King said to Alice.
>
> "Nothing," said Alice.
>
> "Nothing *whatever*?" persisted the King.
>
> "Nothing whatever," said Alice.
>
> "That's very important," the King said, turning to the jury, Carroll, *Alice's Adventures in Wonderland*, The Annotated Alice, p. 155; Clarkson N. Potter, Inc. (1960).

Plaintiffs now turn to the Court and request that the motion be denied in all respects.

Respectfully submitted,

DAVID GERALD JAY
David Gerald Jay

DGJ/jd
cc: William E. Carey, Esq.
James P. Caher, Esq.

APPENDIX H

Decision and Order of June 8, 1981

UNITED STATES DISTRICT COURT

Western District of New York

GEORGE ARTHUR, *et al.*,

Plaintiffs,

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

Civ-1972-325

James Griffin, Mayor of the City of Buffalo, asks for clarification as to whether he is technically a party to this lawsuit. The reason for enquiry is that his predecessor in office, the late Frank A. Sedita, was found not to have been guilty of racial discrimination in this court's original liability decision of April 30, 1976. *Arthur v. Nyquist*, 415 F.Supp. 904, 959 (1976).

In addition, the Mayor seeks to have certified to the Court of Appeals pursuant to 28 U.S.C. §1292(b), a controlling issue of law.

Defendant School Board and plaintiffs oppose certification. They claim that there are no novel legal issues presented. Plaintiffs agree that the Mayor should be deemed a party. Defendant School Board stated at oral argument that if the court does certify a question for appeal, it would petition the court to stay its order of May 19, 1981. No other parties have taken a position.

The court finds that the Mayor is a party to this lawsuit. Under Rule 19 of the Federal Rules of Civil Procedure, a person shall be joined as a party in an action if in his absence complete relief cannot be granted. Since it has been necessary to order the defendants to implement a desegregation plan, it is clear that the Mayor, as a key fiscal officer of the City, is an essential party. It is consequently unnecessary for me to determine whether he is a party to this lawsuit for other reasons as well.

The certification issue is equally clear cut. 28 U.S.C. §1292(b) states:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

The Mayor argues that the court's May 19th order contains a controlling issue of law:

> what constitutes the maximum desegregation practically achievable, in this case, at this time?

Letter from Joseph P. McNamara, dated June 5, 1981, at 2. There are several problems with the Mayor's position. First, the issue he proposes be certified is one of fact, not law. He appears to be challenging the court's factual

finding, not the underlying legal principle. This is not the purpose of §1292(b). Second, in this very case the United States Court of Appeals for the Second Circuit directed this court to determine whether the Board's Plan represents "the maximum desegregation practically achievable" just six months ago. *Arthur v. Nyquist*, 636 F.2d 905, 907 (January 5, 1981). Consequently, it cannot be said that there is *any* ground for a difference of opinion as to controlling law. Third, the Mayor's application assumes that the May order is not subject to appeal as of right under 28 U.S.C. §1291. While the Court of Appeals has once before indicated that in the absence of specific findings of fact an appeal in this case would be "premature," *Arthur v. Nyquist*, 636 F.2d *supra* at 906; it is also true that the May order was in the nature of a preliminary injunction, which is appealable. *Arthur v. Nyquist*, 547 F.2d 7, 8-9 (1976). It is clear learning that interlocutory orders granting or denying a preliminary injunction are appealable, albeit there is only a limited scope of review. *See generally, Hall v. West*, 335 F.2d 481 (5th Cir. 1964); *Ames v. Associated Musicians*, 359 F.2d 777 (2d Cir. 1976); *Carroll v. Associated Musicians*, 284 F.2d 91 (2d Cir. 1960). In other words, the Mayor may appeal without prior recourse to this court. Whether he can claim to be a person aggrieved or has any chance of success in such an endeavor, or course, is another matter entirely.

Having denied the petition for certification, I will also deny the motion for a stay.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: June 8, 1981

APPENDIX I

Notice of Appeal

UNITED STATES DISTRICT COURT

Western District of New York

GEORGE ARTHUR, *et al.*,

Plaintiffs,

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

Civil 1972-325C

NOTICE is hereby given that JAMES D. GRIFFIN, as Mayor of the City of Buffalo, a party in the above action, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order of the District Court entered in this action on the 19th day of May, 1981.

DATED: Buffalo, New York
June 9, 1981

JOSEPH P. McNAMARA
Corporation Counsel
JAMES P. CAHER, ESQ.,
of Counsel
Attorney for JAMES D. GRIFFIN,
Mayor of the City of Buffalo
Office & P.O. Address
1100 City Hall
65 Niagara Square
Buffalo, New York 14202

JPC:CKR/kf

APPENDIX J

Notice of Motion and Supporting Affidavit.

UNITED STATES COURT OF APPEALS

For the Second Circuit

GEORGE ARTHUR, *et al.*,
Plaintiffs-Appellees,

vs.

EWALD P. NYQUIST, *et al.*,
Defendants-Appellants.

(Use short title)

Docket Number_____.

NOTICE OF MOTION *(state type of motion)* for Dismissal of Appeal, Disqualification of Appellant Counsel and setting date for Pre-argument Conference.

MOTION BY: DAVID GERALD JAY
716-856-6300
(Name and telephone number of attorney in charge)

OPPOSING COUNSEL: JAMES P. CAHER
716-855-4343
(Name and telephone number of attorney in charge)

Has opposing counsel consented? [ ] Yes [x] No

Has service been effected? [x] Yes [ ] No

Is oral argument desired? [x] Yes [ ] No
(Substantive motions only)

Requested return date: July 14, 1981
(See Second Circuit Rule 27(b))

Appendix J—Notice of Motion and Supporting Affidavit.

Date of argument of appeal, if scheduled: Unscheduled

Judge or agency whose order is being appealed: Hon. John T. Curtin, USDJ, WDNY.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below?
(See F.R.A.P. Rule 8.) [ ] Yes [ ] No

Would expedited appeal eliminate need for this motion?
[ ] Yes [ ] No

If no, explain why not:

Brief statement of the relief requested: Dismissal of appeal as frivolous and sham, having been filed only for purposes of delay. Disqualification of counsel for Appellant due to conflict of interest. Due to financial considerations and distance movant requests pre-argument conference to be scheduled on the same day as return date of this motion.

Previous requests for similar relief and disposition: None.

Statement of the issue(s) presented by this motion: 1. Does Appellant have standing? 2. Is he aggrieved by the Decision below? 3. Is the Appeal being brought for any purpose other than delay? 4. Is there a conflict of interest among the Defendants such that Counsel for Appellant must withdraw? 5. Can pre-argument conference be scheduled for July 14, 1981?

Brief statement of the facts (*with page references to the moving papers*): On January 5, 1981, this Court remanded to the District Court an appeal by Plaintiffs claiming that Phase III of the desegregation remedy was inade-

quate. (Ex. H). On January 27, 1981, the Board of Education filed with the District Court, Phase IIIx (expedited Phase III) of the remedy, calling for fixed assignments affecting a large number of unintegrated schools to commence by September of 1981. A hearing was held and on May 19, 1981, the District Court issued an Order approving Phase III (Ex. A). By Motion dated June 2, 1981, the Mayor of the City of Buffalo ask permission to be made a party to the action and for certification of the Order under 28 U.S.C. §1292 (b). (Ex. B). By Order of June 2, 1981 (Ex. C) the Motion was briefed (Exs. D, E & F). By Order of June 2, 1981 (Ex. G), the Mayor is made a party but the request for certification is denied.

Summary of the argument (*with page references to the moving papers):* Only the non-appealing Board of Education and Common Council are affected by the Order appealed. The Mayor's Office is not directed to do anything. (pp. 1-3, Affidavit of D.G. Jay). His Counsel has a conflict of interest, since the same law office represents the non-appealing co-defendants, who have taken a position adverse to that of the Mayor. (pp. 3-4, Affidavit of D.G. Jay). The only purpose for the appeal is to seek a delay of the implementation of the District Court's Order of May 19, 1981, making it a sham or frivolous appeal.

June 22, 1981
Date

DAVID GERALD JAY
The name signed must be printed beneath
David Gerald Jay

For completion by the Clerk of Court

Motion Control Number_____

Appendix J—Notice of Motion and Supporting Affidavit.

Affidavit of David Gerald Jay

UNITED STATES COURT OF APPEALS

For the Second Circuit

GEORGE ARTHUR, *et al.*,

Plaintiffs,

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

State of New York
County of Erie
City of Buffalo } ss.:

DAVID GERALD JAY, being duly sworn, deposes and says:

1. I am attorney for the Plaintiff in the above-entitled matter, and am an attorney at law, duly licensed to practice in the Courts of the State of New York, and was admitted to the Bar of this Court on February 8, 1971.

2. That the Mayor of the City of Buffalo, in his official capacity, was originally a party to this action, but was absolved from responsibility in the original liability decision of April 30, 1976.

3. Since that date, until recently, the Office of the Mayor has not been a party to this action. Phases I, II, III and IIIx of the Remedy has been filed by the Defendant Buffalo Board of Education; the District Court has taken action on each of these Phases and the case has proceeded.

4. Subsequent to the remand of this matter to the District Court on January 5, 1981, and specifically, on January 27, 1981, the Board of Education filed its Phase IIIx with the District Court. Countless meetings were had and a hearing was held as to the propriety of the implementation of Phase IIIx for the school year commencing September, 1981. The Mayor's Office chose not to participate in any of these matters.

5. It was only after the Court made its Decision on May 19, 1981 (attached hereto as Exhibit "A"), that the Mayor belatedly made a Motion to be made a party and also sought certification of the Court's May 19, 1981 Order for purposes of Appeal. (See Exhibit "B" attached hereto.)

6. The District Court ruled that certification, pursuant to 28 U.S.C., §1292(b) was inappropriate, since the Court felt that its Order was appealable as of right.

7. Assuming that the District Court is correct, and that the Order is appealable, it is clear that it directs only the Board of Education to implement Phase IIIx of the Buffalo School Desegregation Plan. The Mayor's Office is not mentioned in the Order, nor is he directed to do anything.

8. From the standpoint of appealability, it is therefore clear that the Mayor is not an aggrieved party, nor does he have standing to bring this appeal for his co-party, the Board of Education.

9. Deponent has waited the entire thirty-day period, to make the instant Motion, to ensure that no other parties would file Notices of Appeal. None has.

10. The record is now clear that all parties acquiesce in the May 19, 1981 Order, with the exception of the newly-added Office of the Mayor. The relief he seeks, as stated in his affidavit attached to his Motion dated June 2, 1981, is as follows:

> "These measures have been successful in the past and should at least be permitted to continue for one more year."

11. What the Mayor seeks only from this Court is delay, delay in the implementation of the District Court's Order, delay in spite of the District Court's finding that further delay is impermissible, delay in spite of this Court's mandate of January 5, 1981, indicating that further delay is impermissible, delay in spite of the fact that all other parties have indicated that they can and will implement the District Court's Order.

12. It is unfortunate that the Mayor's Office feels that it must take this action, and it would be more unfortunate to have to fully brief and argue this doomed appeal, in light of the history of this case and its posture at the present time. The frivolousness of this appeal is apparent on its face, and it should be dismissed for that reason.

13. The Department of Law of the City of Buffalo is headed by Joseph P. McNamara, Corporation Counsel of the City of Buffalo. Under his auspices, the defense of the Buffalo Board of Education and the Common Council has proceeded since the liability finding of 1976. With the entry of the Office of the Mayor into this case on June 8, 1981, Mr. McNamara has taken on a client whose interests are factually and legally adverse to that of his

other clients, the Board and the Council. It is interesting to note that the two letter-briefs from the Department of Law, dated June 5, 1981, although signed by two different persons, emanate from the same law office and present divergent views. It is clear that the Mayor's Office must have other counsel, and selection of other counsel should be ordered by this Court.

14. Due to costs and distance considerations, it is respectfully requested that any pre-argument conference scheduled in this case be set for the same day as the argument of this Motion.

WHEREFORE, Deponent respectfully requests as follows:

a. That the appeal be dismissed;

b. That counsel for the Appellant be disqualified; and

c. Pre-argument conference in this matter be scheduled for the same day as the argument of this Motion.

DAVID GERALD JAY

Sworn to before me this
22nd day of June, 1981.

LEONARD J. KLAIF
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1983

APPENDIX K

Response of Joseph P. McNamara in Opposition to Motion to Dismiss

UNITED STATES DISTRICT COURT

For the Second Circuit

GEORGE ARTHUR, *et al.*,
Plaintiffs-Appellees,

vs.

EWALD P. NYQUIST, *et al.*,
Defendants-Appellants.

State of New York
County of Erie
City of Buffalo } ss:-

JOSEPH P. McNAMARA, being duly sworn, deposes and says:

1. I am Corporation Counsel for the City of Buffalo, and I make this affidavit on behalf of JAMES D. GRIFFIN, Mayor of the City of Buffalo, in opposition to Plaintiffs-Appellees' motion to dismiss this appeal.

2. Plaintiffs-Appellees urge that this appeal be dismissed for two reasons: one, because the appeal is "frivolous" and its sole purpose is delay; and two, the Mayor has no standing to take this appeal because he is not "aggrieved" by the Order appealed from. Plaintiffs-Appellees also assert that I should be disqualified from representing the Mayor in this appeal because of a conflict of interest.

3. The most recent appeal of this case was argued before this Court on December 12, 1980 and decided January 5, 1981. *Arthur v. Nyquist,* 636 F2d 905 (1981) (Exhibit H to Plaintiffs-Appellees' moving papers). The subjects of this appeal were orders of the District Court directing implementation of a desegregation plan known as "Phase III". The District Court order presently before this Court is one directing implementation of an accelerated version of "Phase III", commonly referred to as "Phase IIIx".

4. It is the Mayor's position on this appeal that the District Judge has failed to make findings of fact and conclusions of law under Fed. R. Civ. Proc. 52(a) sufficient to support either "Phase III" or "Phase IIIx".

5. In *Arthur v. Nyquist, supra,* the Court of Appeals *remanded* this case to the District Court with the express direction to make such findings. However, this was not done for either "Phase III" or "Phase IIIx". The Court of Appeals clearly recognized that such findings are necessary if any party to this litigation is to receive meaningful judicial review of the trial court's actions. Specifically, the Court of Appeals in *Arthur v. Nyquist, supra,* stated at 906:

> "Although too many years have elapsed since this litigation commenced, this court is unable on the record before us to review the district court's approval of Phase III and therefore the case is remanded for further factual development by the district court."

; and further at 907:

> "Furthermore, there are no findings in the most recent orders regarding the shortcomings of Buffalo's *second* school desegregation plan . . ."

; also at 907:

> "On the record presented, we cannot determine whether the Board has demonstrated that Phase III represents the maximum desegregation practically achievable. Until that finding is made, jurisdiction is retained."

6. The trial court itself expressed doubt as to whether it even had jurisdiction and whether the court could proceed prior to making comprehensive findings of fact (See footnote 2 to the Trial Court's decision and order dated May 19, 1981). The trial court nonetheless proceeded upon the consent of the parties (also footnote 2). It is critical to note that at the time, the Appellant Mayor was *not* a party to the lawsuit and could therefore not have consented or be deemed to have consented. In fact, the Mayor was not made a party to this suit until the June 8, 1981 Order of the Trial Court (see Exhibit G to Plaintiffs-Appellants' moving papers).

7. Thus, the Mayor is placed in an anomalous position. He has been made a party to this lawsuit. An order in the nature of a preliminary injunction (see Exhibit G to Plaintiffs-Appellants' moving papers) has been entered against him. Yet, by its failure to make factual findings required by Fed. R. Civ. Proc. 52(a) and the Court of Appeals, the Trial Court has prevented the Mayor from obtaining judicial review on the merits. For this reason, the Trial Court's Order of May 19, 1981 must be reversed until such findings are made as will permit meaningful judicial review.

8. As far as the Mayor's standing to appeal is concerned, the Trial Court in its June 8, 1981 decision (Exhibit G to Plaintiffs-Appellants' moving papers) expressly stated at page 3:

> "While the Court of Appeals has once before indicated that in the absence of specific findings of fact an appeal in this case would be 'premature', *Arthur v. Nyquist*, 636 F2d, supra, at 906; it is also true that the May order was in the nature of a preliminary injunction which is appealable. *Arthur v. Nyquist*, 547 F2d 7, 8-9 (1976). It is clear learning that interlocutory orders granting or denying a preliminary injunction are appealable, albeit there is only a limited scope of review. [citations omitted] *... In other words, the Mayor may appeal without prior recourse to this court.*" [emphasis added]

9. In response to Plaintiffs-Appellants' assertion that a conflict of interest prevents me or my office from representing the Mayor in this appeal, some background may be helpful to an understanding of the situation.

The Corporation Counsel's office has represented the City and School Board Defendants for the past 50 years.

Special Counsel was retained to assist the Board of Education in the remedy phase of this lawsuit by the prior Corporation Counsel, with the consent of the Board. The major purpose was to enlist the specialized knowledge and expertise of special counsel to assist the Board in forming an appropriate remedy.

Special Counsel has, in addition, made formal and informal reports and suggestions to the Corporation Counsel, who in turn has advised the executive and legislative branches of City government.

Appendix K—Response of Joseph P. McNamara in Opposition to Motion to Dismiss.

The separation of governmental units set forth in State Law and the City's Charter is a check-and-balance system designed to permit differences of opinion and vigorous debate. Nonetheless, the Charter framers recognized that in general terms, the legal obligations of any of these relatively antagonistic institutions would necessarily converge and thus, pursuant to the Charter, and as a matter of practice, the Corporation Counsel has represented all of these local governmental institutions.

Indeed, in this case, the Corporation Counsel's office represented all the City and Board Defendants throughout the liability proceedings, both at trial and on appeal, recognizing the futility of obtaining a favorable verdict for one defendant but not for the other defendants.

During the remedy phase of this litigation, serious disagreements have arisen between the local government parties that provoked intermittent litigation before the trial court, where appropriate special counsel has been retained to assist City Defendants.

These litigious incursions, however, should be viewed against the broader background of the relative animosity that traditionally has characterized their symbiotic relationship.

Furthermore, even if an actual conflict of interest were present in this case, disqualification would not be warranted. Any conflict of interest would be adverse to the Defendants' interests, not to those of the Plaintiffs. While the Court has a responsibility to supervise the members of its bar, this Court has held that:

> "When a potential or actual conflict of interest situation arises, it is the court's duty to ensure that the attorney's client, so involved, is fully aware of the nature of the conflict and understands the potential threat to the protection of his interests. Once the court is satisfied, however, that such a client knowingly and intelligently wishes to proceed with joint representation, the court's responsibility is met, and it is without power unilaterally to obstruct the choice of counsel."
>
> *In Re Taylor,* 567 F2d 1183, at 1191 (2nd Cir., 1977).

Despite the length and complexity of this case, none of the parties have previously raised the conflict of interest question in regard to representation by the Corporation Counsel's office.

WHEREFORE, in light of the foregoing, Deponent respectfully requests as follows:

That Plaintiffs-Appellees' motion be in all respects denied.

JOSEPH P. McNAMARA

Subscribed and sworn to before me
this 26 day of June, 1981.

JAMES P. CAHER
Commissioner of Deeds
Buffalo, New York
My commission expires 12/31/82.

JPC:CKR/kf

APPENDIX L

Decision and Order of July 17, 1981

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of July, one thousand nine hundred and eighty-one.

Present:

HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. JON O. NEWMAN
Circuit Judges
HON. EDWARD DUMBAULD,
District Judge

GEORGE ARTHUR, *et al.*,
Plaintiffs-Appellees,

vs.

EWALD P. NYQUIST, *et al.*,
Defendants-Appellants.

#81-7452

It is hereby ordered that upon consideration of the motion to dismiss the appeal, the appeal shall be heard on the merits, today

A. DANIEL FUSARO, Clerk
EDWARD J. GUARDARO
by Edward J. Guardo, Deputy Clerk

Order

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of July, One Thousand Nine Hundred and Eighty-one.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judge
HON. JON O. NEWMAN, *Circuit Judge*
HON. EDWARD DUMBAULD, *District Judge**

GEORGE ARTHUR, *et al.*,
Plaintiffs-Appellees,

vs.

EWALD P. NYQUIST, *et al.*,
Defendants-Appellees,

and

JAMES D. GRIFFIN, as Mayor of the City of Buffalo,
Defendant-Appellant.

81-7452

On this appeal, the Mayor of the City of Buffalo challenges the order of District Judge John T. Curtin, which directs the implementation of so-called Phase IIIx

* Of the Western District of Pennsylvania, sitting by designation.

aimed at furthering the goal of equal educational opportunity for children in the City of Buffalo. The district court found that the advantages derived from the implementation of Phase IIIx exceeded the reasons for further delay, that the plan would maintain quality education and further the goal of equal educational opportunity, and that the plan is practically achievable at the present time.

Because time was of the essence, we heard argument on the merits on an expedited basis.

Plaintiffs-appellees' motion to dismiss the appeal, which brought the matter before this panel, is denied. The order appealed from is affirmed.

ELLSWORTH A. VAN GRAAFEILAND
Hon. Ellsworth A. Van Graafeiland
JON O. NEWMAN
Hon. Jon O. Newman
EDWARD DUMBAULD
Hon. Edward Dumbauld

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.